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LEGAL POSITIVISM: AN OBSTACLE IN THE PROCESS OF STRENGTHENING THE RULE OF LAW IN BOSNIA AND HERZEGOVINA

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Abstract: *So far, a legal positivism issue in the process of strengthening the rule of law in Bosnia and Herzegovina was not recognized by the wider academic community. The expert report on rule of law issues in Bosnia and Herzegovina addresses, for the first time, legal positivism as a part of the process of strengthening the rule of law in Bosnia and Herzegovina. This paper is an attempt to gather, and in one place present all the advantages offered by the constitutional system of Bosnia and Herzegovina that were not used by its institutions due to the application and implementation of legal positivism. This paper demonstrates misguided reform policies whose sole purpose was the strengthening of the rule of law in Bosnia and Herzegovina but turned to be just superficial adjustments that were unsuccessful. The paper argues the necessity of legal education reform as the key element in the process of strengthening the rule of law. Legal education reform is possible through the reduction of legal positivism impact on future lawyers, and this will be accomplished by the change in the paradigm of legal understanding among future lawyers who will make important decisions on the rule of law in Bosnia and Herzegovina. Two strategic objectives must be met in terms of legal education reform for the strengthening of the rule of law: the development of a critical stance towards legal provisions in force and training in the use of international instruments during the decision-making process.*

Keywords: *Bosnia and Herzegovina; Legal Positivism; Rule of Law; Constitution; Legal Education*

INTRODUCTION

Formally, Bosnia and Herzegovina (hereinafter referred to as 'BiH') is a country with a constitution that supports the modern concept of the rule of law. No other constitution in the world protects human rights to such an extent as the Constitution of BiH (Chandler 2000). In this connection, the Preamble of the Constitution of BiH (1995) states: "Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, as well as other human rights instruments". It is evident from the preamble of the Constitution of BiH that human rights are listed as an inspiration for the enactment of the Constitution. Article I (2) of the Constitution states that Bosnia and Herzegovina shall operate under the rule of law and with free and democratic elections. The modern concept of the rule of law requires two criteria: The first is the existence of legal supremacy (constitutional state) and the second criterion is that the legal supremacy meets the criteria for internationally recognized human rights.

The Constitution of BiH formally meets both criteria. Legal supremacy is evident in the existence of the Constitutional Court that has the authority to declare unconstitutional acts and repeal all the acts that are against the Constitution of BiH (Išeric 2019). Also, the Constitution of BiH supports the protection of internationally recognized human rights. Therefore, Article II (2) of the Constitution of BiH states that the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as 'ECHR') shall apply directly and have priority over all other laws. Article II (6) of the Constitution of BiH states that all institutions in BiH, either at the state or entity level, shall apply or conform to the human rights referred to in ECHR. Annex I of the Constitution of BiH lists 15 additional human rights agreements to be applied in BiH,¹ and in Article II(7) of the Constitution of BiH, it is specified that BiH shall remain or become a party to the international agreements listed in Annex I to the Constitution.

¹Annex I lists the following international agreements: 1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 4. 1957 Convention on the Nationality of Married Women; 5. 1961 Convention on the Reduction of Statelessness; 6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 8. 1966 Covenant on Economic, Social and Cultural Rights; 9. 1979 Convention on the Elimination of All Forms of Discrimination against Women; 10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 12. 1989 Convention on the Rights of the Child; 13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 14. 1992 European Charter for Regional or Minority Languages; 15. 1994 Framework Convention for the Protection of National Minorities.

Moreover, the Constitution of BiH, as a distinctly one-tier model constitution, supports the interference from the international law on the internal BiH system, and apart from the constitutional provisions aforementioned, Article III(3) of the Constitution states that: "(...) The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities" (Constitution of BiH 1995). Whereas, Article VI(3)(c) of the Constitution of BiH states that the Constitutional Court shall have jurisdiction over issues referred by any court in BiH concerning whether a law is compatible with the Constitution. Also, the Constitutional Court assesses the compatibility of the law with the European Convention for Human Rights and the general rules of public international law. The initial statement, which asserts that the constitutional system in BiH is formally considered unique in terms of human rights protection, is fully justified and responds to the above-mentioned arguments.

However, the Constitution of BiH contains provisions that are not in compliance with human rights standards, as was ruled by the European Court of Human Rights (hereinafter referred to as 'ECtHR') in judgments in the Sejdic and Finci, Zornic, and Pilav cases. Although those are three different judgments, the core of these judgments is that the current model of constituent peoples in BiH conflicts with the modern concept of the rule of law and human rights. So, the current model of constituency enables only the members of the constituent peoples to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina. Another issue here is the fact that members of constituent peoples have limitations to their candidacy, meaning that Serbs who are citizens of the Federation are not entitled to nomination to the Presidency as well as Bosniak and Croat citizens of the Republic of Srpska (Begic 2013). In all of this, the largest negative impact on democratic processes in BiH is the position of the House of Peoples of BiH. This exclusive legislature body is reserved only for the members of constituent peoples and it participates in the adoption of legislation even though their members are elected indirectly. In that respect, non-constituent citizens, whether being minorities or just citizens of BiH, are politically less valuable than constituent peoples. Regardless of the will of a majority in the democratically elected House of Representatives of BiH, without the consent of the House of Peoples, such will does not have legal consequences in terms of law adoption. The ECtHR recognized such systemic discrimination, but BiH did not take any steps towards eliminating such discrimination although it has passed more than 10 years since the ECtHR ruling in the Sejdic-Finci case. Of course, this is not the only problem in BiH in terms of human rights violations, but certainly is one of the biggest because it is systematic and to resolve the problem, it is necessary to change the whole system which is based on the concept of the constituency of peoples. This paper does not discuss the enforcement of the judgments of the ECtHR in the legal system of BiH, but rather the utilization of the current constitutional model in BiH. The current constitutional model in BiH offers a possibility for the strengthening of the rule of law, but in practice, the rule of law in BiH stagnates,

i.e. the strengthening does not take place. One of the problems that prevent the strengthening of the rule of law in BiH, and yet the most obscure one, is legal positivism and formalism.

LEGAL POSITIVISM IN BOSNIAN LEGAL SYSTEM

Legal positivism in BiH reaches back to former Yugoslavia because BiH as a former Yugoslav republic followed legal trends that Yugoslavia used as a reference. After World War II and the establishment of Yugoslavia on socialist and Marxist principles, legal formalism was retained within Yugoslavia. In this legal culture, judges were agents of the mechanical application of the legal text to facts. Legal syllogism was the main method of the decision-making process, where deciding cases on the formal ground was more important rather than merits. According to Ivan Padjen, after 1948 legal thought was developed along two lines, Marxist inspired and based on Hans Kelsen's theory.

According to Marxist theory, the law is a product of bourgeoisie society, and therefore the whole Marxist theory has a negative view of law as a product of bourgeoisie society (Karcic 2020). On the other hand, Hans Kelsen who promoted ideas of legal positivism argued against constitutions that contain general principles such as equity, morality as well as human rights, and these principles, in his view, could thereby lead to excessive interpretation by the judges and in that case, the judges would become the lawmakers (Sweet 2002). In that manner courts in ex-Yugoslavia were only apparatuses for exercising rights prescribed by the state. According to Degan, it is unknown whether any court in ex-Yugoslavia in its decision referred to any international convention or international customs related to human rights, although former Yugoslavia was a member state of most international treaties on human rights in force at that time (Degan 2011). The most influential Yugoslav theoretician of law, Radomir Lukic whose views were similar to Soviet theory of law in his definition of the law states: "Totality of general norms sanctioned by the state which preserve a way of production in the interest of the ruling class" (Karcic 2020). Therefore, Marxist ideology influenced the development of the Yugoslav legal system which was used as a tool for maintaining political elites in power, while at the same time legal positivism influenced judicial decision-making in terms of strict law application the courts without the possibility of using principles such as human rights. In that way, laws adopted by the state are the only relevant for the citizens, and by extension, the state was the only subject allowed to create rights and obligations for its citizens. Elements of the socialist legal culture are still present in the Bosnian legal system, less in form but more in the minds of individuals who make decisions important for the Bosnian legal system. That is not surprising considering that individuals in charge of legal tasks in former Yugoslavia,

continued working in a new political system without a change in their perspective on the role of law and state.

Alan Uzelac lists the following features of the survived socialist legal tradition in the former Yugoslavia: the instrumentalist approach to law, that is, a legal process is a tool for the protection of the interest of political elites; fear of decision-making by the judges; various formal procedural issues which were always welcome as a means to dismiss a case on formal grounds; and low, but the comfortable status of judges whose position was seen as clerical rather than elite and who were elected based on political merit to the Communist Party (Karcic 2020). Certainly, these elements of the socialist legal culture can be seen in the modern BH legal system, but in a different shape. For example, in the modern BH legal system judiciary is still seen as a clerical position, and judges are tasked with quick and efficient decision-making without any creativity, so the fact that judges still do not belong to the highest elites speaks volumes. In public discourse, the word elite is used to denote political elite, whereas the judiciary, in many respects, is not even considered an authority.

Another issue is also a lack of independence and autonomy of the judiciary power from the other two branches, except nowadays multiple political parties in power interfere with the autonomy of judicial authority compared to the Yugoslav legal system where only the Communist Party was in power. It is unrealistic to expect the strengthening of the rule of law with the existence of such judicial authority which is afraid to make heroic decisions, does not have a status of elite, politically is dependent, and at the same time burdened with a strict form of complicated procedures.

LEGAL POSITIVISM AS THE MAIN OBSTACLE FOR THE RULE OF LAW STRENGTHENING

The experts' report on rule of law issues in Bosnia and Herzegovina (hereinafter referred as: Report), known as 'Priebe Report', states that in many areas, legislation in BiH is in line with European and other international standards, but there is a considerable gap between legislation and practice, and the positivist and formalistic behavior of many officeholders often appears as a real obstacle to proper implementation of such standards. The Report states that civil justice proceedings are too long and formalistic, which makes the judicial system less efficient and leads to infringement of the right to a fair trial, where the evidence of such violations has been found in many cases by the BiH Constitutional Court (Expert Report on Rule of Law issues in BiH 2019). There are some systemic errors in the Constitution of BiH, which was pointed by the ECtHR, but the Constitution of BiH allows the creative role of judicial authority and in those terms, the judiciary could shape political processes in BiH. This creative role was not only given to the Constitutional Court of BiH, which already used this possibility in many cases (Ademovic, *et al.* 2012) but to the judicial authority in the

whole, i.e. courts in BiH at all levels. Article VI(3)(c) of the Constitution of BiH states that any court in BiH concerned whether a law, on whose validity its decision depends, is compatible with the Constitution, the ECHR, or with the laws of BiH, and a general rule of public international law, can refer such law to the Constitutional Court of BiH. Unfortunately, it is evident from the statistics available on the Court's official website that none of the ordinary courts made use of this possibility. From the adoption of the Constitution until the writing of this paper, ordinary courts referred to laws for the review of their constitutionality only in 37 instances (Constitutional Court of BiH). In that way, the Constitutional Court in BiH is immobilized in terms of its inability to make decisions regarding the constitutionality or non-constitutionality of a certain law since ordinary courts, which should be very informed with the constitutionality of the specific law, do not exercise the right to refer it to the Constitutional Court of BiH. As a result, some laws violate human rights guaranteed by the Constitution of BiH, but the Constitutional Court of BiH cannot pass judgments on these issues due to the misunderstood role of ordinary courts in the legal system of BiH. So in those terms, ordinary courts do not have a role provided in the modern concept of the rule of law and supported by the Constitution of BiH, which is primarily the protection of individuals and not a strict application of the law without taking into consideration how these laws violate the rights of individuals. Judicial authority does not exist merely to execute legal provisions made by executive and legislative branches, but to guide political processes by referring unconstitutional laws in terms of human rights violations guaranteed by the Constitution, to the Constitutional Court of BiH for the review of their constitutionality and in that way restricted the power of executive and legislative branches. Quite the opposite, ordinary courts in BiH preserved their role from the previous political system by implementing blindly legal provisions and in that way weakening the possibility for the strengthening of modern rule of law. As already stated, courts act as bureaucratic institutions concerned more with meeting the set number of passed judgments rather than satisfying justice and protection of human rights.

STRENGTHENING THE RULE OF LAW REFORM

As it was previously stated, the ECtHR established that the Constitution of BiH contains discriminatory provisions, but if we exclude this fact and complicated decision-making procedure in state legislative bodies, the Constitution of BiH represents a modern constitution which to a great extent protects human rights. As it was stated in the Report, possibilities offered by the Constitution are not used due to a formal understanding of the law by the individuals who interpret and apply the law in the Bosnian legal system. In those terms, the question arises as to what changes must be implemented to strengthen the rule of law in BiH. BiH already took some steps in that direction, and for that purpose adopted the Reform Agenda for Bosnia and Herzegovina

2015–2018 (hereinafter referred to as 'Reform agenda') which states that there is a need to strengthen the rule of law which must be built on a foundation of concrete progress in the fight against organized crime, terrorism, and corruption. It further states that judiciary reform strategy will be adopted for the establishment of an effective system, enhancing professionalism among judges, prescribing objective criteria for appointments of judges, and prevention of corruption and conflict of interest within institutions in BiH (Reform agenda 2015). According to the rule of law index for 2020, conducted by the World Justice Project, BiH had the lowest results in Absence of Corruption factor (Bock et al. 2020). This is an indicator that BiH is applying the wrong strategy for strengthening the rule of law. In one part of the Reform agenda, it is stated that: "(...) professionalism and integrity will be enhanced through prescribing objective criteria for appointments of members of the judiciary and the adoption of integrity measures throughout the judiciary in BiH; and disciplinary accountability of the members of the judiciary will be reinforced by adopting new rules for disciplinary proceedings and introducing new disciplinary measures" (Reform agenda).

This shows all misconceptions regarding the strategy needed to strengthen the rule of law since further standardization and sanction prescriptions will not lead to strengthening the rule of law. The legal system in BiH, as already mentioned, needs a change in the paradigm of legal understanding, and not much was done in that area. The obsolete legal education system, and in particular the education of judicial office holders, does not contribute to the rule of law. One of the conditions for carrying out judicial duties is passing the bar exam, a written and an oral part, with questions related to criminal law, civil law, family law, labor law, commercial law, administrative law, constitutional system, and organization of judiciary in BiH. We can see that candidates are expected to show knowledge in almost all areas of positive legal branches, whereas, according to Fikret Karcic, there is no single area that would educate a candidate on the 'Law and Society' approach, which in turn would make future members of judiciary critical towards the existing legal provisions (Karcic 2020). So, the strengthening rule of law reform, without substantial changes in the education of lawyers who apply and interpret the law, is impossible and in BiH not much was done in those terms. The constitutional system in BiH demands from the judiciary to be extensive and creative during law interpretation and application, but current judicial authority uses legal formalism and positivism in law interpretation and application, and one of the reasons is the education of judicial office holders, which is not following the demands of the modern rule of law concept. Current legal education is not following the demands of rule of law because, during their education, lawyers are taught how to apply legal provisions and not how to critically observe them. Without critical interpretation of the law, it is impossible to strengthen the rule of law. The strengthening of rule of law in BiH should start from additional standardization towards utilization of the current constitutional legal order, which undoubtedly provides the opportunity to strengthen

the rule of law. In that regard, BiH missed the opportunity to take one radical, but necessary measure and that is to use the Czech Republic model, where the Constitutional Court prohibited all individuals that performed public duties in the communist system, to perform public duties in the new political system (Sadurski 2014).

Because the Bosnian legal community, from courts to faculties, is dominated by lawyers who have a formalistic approach to legal interpretation, such decisions from this point of view would be quite understandable were it made after the entry into force of the Constitution of BiH. No matter how much the current Constitution of BiH is following the modern rule of law concept, in which individual rights take priority over the state, such concept cannot be utilized in BiH as long as the legal community is dominated by individuals educated in previous legal education, where the state comes first and a strict law application is imperative.

LEGAL EDUCATION REFORM WITH THE AIM OF STRENGTHENING THE RULE OF LAW

Legal education reform, as discussed above, is a necessary element in strengthening the rule of law in BiH. The question remains, in which direction such reform should take place. Most of the public criticism regarding legal education in BiH was related to the unpreparedness of the law graduates to work in their professional branch, i.e. the absence of sufficient practical knowledge. However, such a problem is technical, and solving it does not require major changes but handling this problem still does not resolve the absence of rule of law. To strengthen the rule of law, it is necessary to create a critical interpretation of the law in force among future legal minds. Bar exam reform is also necessary, so it shifts from being only an assessment of knowledge in positive legal branches into an exam that would demand a 'deeper' understanding of legal norms, their purpose, and effects to create a critical interpretation of legal provisions in force among future lawyers. Also, it is necessary to focus more on the education of lawyers in the areas of the rule of law, human rights, justice, economic implications of legal norm applications, etc. Having that in mind, legal education reform should have two key strategic goals for strengthening the rule of law. The first goal of education is to create a judicial elite that would be the counterpart of the political elite, not a subordinate. Of course, such a goal is not achievable only through education, however, education plays a vital role in preparing future judges and prosecutors that would serve the citizens and not the state or the political elite in power. Future judges should be educated as individuals who would direct political processes and not as executors of legislation adopted by executive and legislative branches. To achieve that, it is necessary to develop a critical approach toward legal provisions because legal positivism influenced in creating the awareness of untouchable legal provisions, namely the necessity of their application.

To strengthen the rule of law, it is necessary to create a true judicial elite which will be a counterpart to the political elite together with a judge training for the use of modern instruments in decision-making, and not only in the Constitutional Court of BiH or constitutional courts of the Entities but also in ordinary courts and in that way fulfill the obligation from the Constitution of BiH regarding the direct application of ECHR in all institutions in BiH. That way legal education reform should refer to the creation of a real judicial elite and an increase in usage of international instruments, specifically the ECHR, by the ordinary courts. Undoubtedly, the development of a critical stance towards legal provisions in force would result in a larger number of demands for the review of decisions of ordinary courts for their constitutionality, which at the moment is not the case, as we have seen a small number of constitutional reviews petitioned to the Constitutional Court of BiH.

How to reform legal education in Bosnia and Herzegovina?


The reform of education of future judges and prosecutors should reflect on the change of how the judicial state examination is taken. Currently, this examination in BiH contains the obligation of taking the exams on positive law, including civil law, criminal law, constitutional law, family law, labor law, commercial law, and constitutional law. We get the impression, confirmed in practice, that the judicial state examination prepares future judicial officials for a mechanical implementation of legal norms, but we should also note that the system of preparing and taking the judicial state examination is itself very formal and positivist and future judicial officials are prepared only for the implementation of norms, not for a critical view of the norms of positive law. Therefore, we pose the question of how to improve the current model of education of future judicial officials? Firstly, as already mentioned, apart from preparing future judicial officials to implement legal norms, they should be prepared to be critical of these norms. Fikret Karcic stated that a separate course should be introduced which will tackle the relationship of law and society, which should develop a critical attitude of judges toward the norms implemented in practice (Karcic 2020). Moreover, a more detailed study of international human rights is necessary, because it is strange and paradoxical that in the constitutional system, which offers the widest protection of human rights in the world, future judicial officials are not trained to implement international mechanisms for the protection of human rights. This is why a separate course of international human rights should be introduced to adequately and comprehensively train judges to implement international mechanisms to protect human rights when making decisions. Currently, the judicial state examination only briefly reflects on human rights as part of the course of constitutional law, which certainly is not enough considering that the Constitution of BiH is intertwined with human rights. Such reform of the judicial state examination could certainly yield results in the long term, but there is a problem of what

to do with the current judicial officials who are deeply rooted in the old education system which, as already stated, is formalistic and positivist.

BiH has a judicial officials training system established at the level of the Federation of Bosnia and Herzegovina named Public Institution Centre for Judicial and Prosecutorial Training of the Federation of BiH which organizes various training, including those about the implementation of human rights during court decision-making. In practice, the main problem of the education of professional judicial officials is the abstraction of new knowledge, and educators find it difficult to impose new concepts or new methods on judicial officials who already have a professional career (Murtezic and Trlin 2018). In this regard, eliminating the positivist approach to the implementation of legal norms, in their full capacity, by the current judicial officials is impossible. Small steps forward are possible, but new opinions cannot be imposed on professionals. This is why it is very important to direct new generations of future judicial officials toward a modern approach of the implementation of legal norms, who will develop a critical attitude toward legal norms, both in the context of human rights and social implications of the implementation of legal norms. Such reform is important to prepare future judges and prosecutors to make decisions in line with a modern concept of the rule of law because we can see that professional judges and prosecutors have difficulties changing their opinions. Therefore, training before assuming the judicial position is crucial for capacitating future judges and prosecutors to harmonize their actions with the modern concept of the rule of law. The reform of the judicial state examination can achieve that purpose because it is a step toward the qualification for future judicial officials once they graduate from law school.

CONCLUSION

Legal positivism and formalism represent one of the major obstacles to strengthening the rule of law. Not much is being done to resolve this issue since it is not recognized by the wider academic community, nor the political elite which is formally committed to strengthening the rule of law. The Report on the subject of legal positivism and formalism should provide an insight into the work of Bosnian institutions. Certainly, the problem is the fact that the work of the institution is based on procedures that are generally adopted to serve the state and not the citizens, and to strengthen the rule of law this is one of the things that need to be changed. Legal education reform is a necessary condition for the removal of the dominant positivist and a formalistic approach to legal interpretation and application. Legal education reform, from faculties to bar exams, should above all reflect in the change of legal paradigm, and the positivist view of law as a state's tool for governing proceedings and maintaining ruling political elite in power. Also, it is necessary to view the law following the modern rule of law concept, which is as a tool for limiting the state power which will serve the citizens and

not the state. Undoubtedly the change in the paradigm of legal understanding would lead to the introduction of new judges and lawyers adapted to the critical view of legal provisions in force, which would result in strengthening the rule of law and constitutional state. 

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